BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions in the	)	
Telecommunications Act of 1996	)	

REPLY COMMENTS OF THE ATTORNEYS GENERAL OF CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, NEW YORK, NORTH DAKOTA, PENNSYLVANIA, WEST VIRGINIA AND WISCONSIN

The Attorneys General of the states of Connecticut, Delaware, Illinois, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New York, North Dakota, Pennsylvania, West Virginia and Wisconsin ("Attorneys General") file these Reply Comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding issued on April 19, 1996. The Commission is seeking comments on the implementation of the local competition provisions in the Telecommunications Act of 1996 ("the Act").

I. INTRODUCTION

The Attorneys General, as chief law officers of their states, are the primary enforcers of the states' antitrust laws, and also represent their states and the citizens of their states in federal antitrust litigation. As chief legal officers, the Attorneys General have had, and continue to have, an important role in the development of national competition policy.

The Attorneys General strongly support the introduction of effective competition in the telecommunications industry. Competition will bring consumers more and better choices in telecommunications services at lower prices. During the legislative process we emphasized to Congress that deregulation must be built upon antitrust principles to preserve existing competition and ensure that market power is not used to undermine competition or take advantage of consumers. By protecting and encouraging competition, the antitrust laws promote efficiency, innovation, low prices, better management and greater consumer choice. The application of these principles, however, should not jeopardize the historic cornerstone of telecommunications policy -- universal local service at just, reasonable, and affordable rates.

The states and the Commission face a difficult and complex task in implementing the provisions of sections 251 and 252 of the Act. The manner in which these critical issues related to interconnection, collocation, and unbundling of network elements are addressed will be central to determining whether competition will develop successfully in the market for local telephone service. The result of this process should ensure that citizens of every state benefit from the pro-competitive changes mandated by the 1996 Act.

The Commission proposes to establish national standards for many aspects of these issues. The Attorneys General believe that uniform minimum standards in key areas would serve to promote the rapid and efficient entry of competition. These minimum standards would provide a clear framework for achieving the national policy goals embodied in the Act. They would offer valuable guidance to states in their efforts to implement the requirements of the Act. However, the Commission must preserve state flexibility in implementing the Act. Because of the central role of

states in determining local exchange issues, preemption of state authority should be approached very cautiously.

In particular, we support the United States Department of Justice's recommendation that the Commission issue minimum national interconnection and unbundling requirements and allow states to augment those requirements at their discretion. We believe that it is critical that pricing principles be based on forward-looking economic costs. Finally, we recommend that the Commission adopt minimum national standards for good faith negotiating and establish a concurrent state and federal enforcement scheme.

II. THE COMMISSION SHOULD ESTABLISH MINIMUM NATIONAL STANDARDS FOR INTERCONNECTION POINTS.

Section 251(c)(2)(B) of the Act requires each incumbent local exchange carrier ("LEC") to provide interconnection with the LEC's network "at any technically feasible point within [its] network." The Commission proposes to adopt uniform interconnection rules to facilitate competitive entry in the market for local telephone services.[1] The Attorneys General agree that national interconnection standards will assist in expediting competitive entry by reducing potential confusion about interconnection requirements. In particular, we encourage the Commission to provide a clear definition of a "technologically feasible point" and to establish a minimum federal standard for

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[1] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98 (April 19, 1996), Notice of Proposed Rulemaking at ¶ 50 (hereinafter "Notice").

interconnection points.[2] The Commission also should allow states to determine whether interconnection at a greater number of points would also be technically feasible.

The Attorneys General share the views of the United States Department of Justice ("Department") with respect to a minimum federal standard for interconnection points. The Department also recommends that the Commission make a broad determination of interconnection points while allowing states the flexibility to identify additional "technologically feasible" interconnection points.[3]

The Department notes that the purpose of requiring incumbent LECs to afford interconnection at technologically feasible points is to maximize the options available to new entrants.[4] The Department further states that if interconnection points are artificially limited, "would-be entrants will be denied the opportunity to combine facilities in a manner they deem to be most efficient, and competitive entry may be retarded."[5] We agree that the Commission should take an approach that maximizes options for new entrants. Therefore, we concur in the Department's conclusion that absent evidence from potential entrants that more interconnection options than those identified by the Commission will inhibit entry, the Commission should allow states to designate additional interconnection points.

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[2]The Commission appropriately recognizes that such a definition and any minimum standards must be dynamic and forward-looking so as to accommodate technological advances. Notice at ¶¶ 56 and 57.

[3]*See* Comments of the United States Department of Justice at 15-19 (hereinafter"Department Comments").

[4]*Id.* at 16.

[5]*Id.*

We also endorse the Commission's tentative conclusion concerning claims of network harm.[6] We agree that if risks to network reliability are considered in determining whether interconnection at a certain point is technically feasible, the party alleging harm to the network should be required to present detailed information substantiating its claim. This burden is properly placed on the party alleging harm because the relevant information necessary to evaluate such a claim is likely to be in the party's possession. This burden of proof is also consistent with the national policy goal of the Act to reduce barriers to entry.

III. THE COMMISSION SHOULD ESTABLISH MINIMUM NATIONAL STANDARDS FOR UNBUNDLING OF NETWORK ELEMENTS.

Section 251(c)(3) of the Act requires incumbent LECs to provide requesting telecommunications carriers with "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point. . . ." The Commission proposes to take an approach to these requirements that is similar to the approach discussed above in connection with interconnection requirements. The Commission proposes to identify a minimum set of network elements that incumbent LECs must unbundle for any requesting telecommunications carrier and to establish minimum requirements governing such unbundling, including requirements for provisioning and service intervals, nondiscrimination safeguards, and technical standards.[7] The Commission also tentatively concludes that states may require additional unbundling of LEC networks, to the extent

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[6]Notice at ¶ 56.

[7]Notice at ¶ ¶ 77 and 79.

such requirements are consistent with the provision of section 251(c)(3) and the Commission's rules.[8]

The Attorneys General support the Commission's proposed approach with respect to unbundling. We agree that minimum national requirements for unbundling will provide a number of benefits, including uniform technical requirements for ease of network expansion and interoperability between carriers. Minimum national standards will also provide a ready framework for states to use in the process of opening local markets to competition without limiting their ability to prescribe additional unbundling rules tailored to their particular needs and circumstances.

With respect to identifying specific network elements that incumbent LECs must provide on an unbundled basis, the Attorneys General, again, agree with the Department of Justice that the Commission should seek to maximize the options of potential entrants.[9] Congress intended that potential entrants be able to choose the most efficient manner of entry, by receiving access to only the network elements they need without having to purchase other, unnecessary elements. Thus, the Act requires as much unbundling as is technologically feasible. We urge the Commission to establish clear minimum requirements consistent with this statutory goal and, to that same end, to allow states to require additional unbundling requirements.

IV. THE ACT REQUIRES THAT PRICING PRINCIPLES BE BASED ON FORWARD LOOKING, ECONOMIC COSTS.

Among the most important issues related to interconnection and unbundling is that of pricing. The rates for interconnection, collocation, and unbundled network elements will be one of the most

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[8]Notice at ¶ 78.

[9]Department Comments at 20.

significant factors in determining to what extent viable and effective competition will emerge in local markets. The Act sets forth a number of explicit requirements regarding rates for interconnection, unbundled elements, and collocation, including the requirement that such rates be "just, reasonable, and nondiscriminatory."[10] Section 252(d) provides that state determinations of just and reasonable rates for interconnection and network elements must be based on cost and "may include a reasonable profit."[11]

The Act clearly contemplates that states will continue to have primary responsibility for setting actual rates. The Act gives state commissions oversight over all interconnection agreements, as well as statements of generally available terms filed by incumbent LECs.[12] It expressly calls for state commissions to mediate and arbitrate interconnection agreements and specifically determine just and reasonable rates in arbitration proceedings involving pricing issues.[13] The Commission should not usurp the role of states to implement particular costing and pricing methods which are consistent with the forward-looking cost approach required under §252(d).

The Commission tentatively concluded that section 252(d)(1) precludes states from setting rates based on historical or embedded costs.[14] The Attorneys General concur with this conclusion.

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[10]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (hereinafter "1996 Act"), sec. 101, §§ 251(c)(2)(D), (c)(3), and (c)(6).

[11]1996 Act, sec 101, §§ 251(d)(A)(I) and (B).

[12]1996 Act, sec. 101, §§ 252(e) and (f)(2).

[13]See 1996 Act, sec. 101, §§ 252(a)(2) and (c)(2).

[14]Notice at ¶ 123.

The Act, instead, contemplates the use of other cost-based pricing approaches, such as price caps that are indirectly related to costs,[15] or forward-looking cost methodologies such as long-run incremental costs (LRIC).

We believe that this is a reasonable interpretation of the Act's requirement that state determinations of just and reasonable rates for interconnection and unbundled network elements be based on the cost of providing the interconnection or network element "without reference to a rate-of-return or other rate-based proceeding."[16] This provision plainly prohibits a determination of rates based on rate-base and rate-of-return concepts. Historical, or embedded cost, is a traditional rate-of-return/rate-base concept which implies that a company has a "revenue requirement" set in a rate case proceeding. The determination of embedded cost by a state commission would require a determination of a company's regulated rate base and an allowed rate of return on that rate base in order to determine a revenue requirement and to set rates. Because embedded cost is based on accounting costs, it may reflect inefficiencies, excess investment, or the use of outmoded and more expensive technologies.

On the other hand, forward-looking cost methodologies, such as TSLRIC (total service long-run incremental cost), are consistent with the intent of the Act to base regulation on competitive market forces. Incremental costing methodologies are recognized by economists as reflecting the "economic cost" of production and consumption decisions in the economy. Prices based on

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[15]We assume that under any such price-cap regime, the initial "going-in" rates to establish wholesale rates for essential inputs--interconnection, network elements, and collocation--would not be based on past rate-of-return or rate-base proceedings. *See* 1996 Act, sec. 101, §252 (d)(1)(A)(I).

[16]1996 Act, sec. 101 § 252(d)(1)(A)(I).

incremental costs lead to allocative efficiencies by rewarding least cost providers of goods and services which capitalize on efficient production processes.

Cost-based price-cap methodologies that are not based on a determination of embedded cost or rate-of-return are also consistent with the Act. In addition, they offer administratively practical solutions to rate-setting by allowing regulators to set upper limits on prices and allowing market forces to drive prices below rate ceilings. Price-caps and incremental cost methodologies, however, are not mutually exclusive. For example, a TSLRIC study could be used as the basis for establishing a particular price cap.

V. CONTRIBUTIONS TO JOINT AND COMMON COSTS SHOULD NOT BE TREATED AS UNIVERSAL SERVICE SUBSIDIES.

The Commission touches briefly on the issue of universal service in the Notice. Encouraging universal service is among the most important of state telecommunications policies. The Attorneys General are pleased that the Act contains a strong commitment to preserving universal service. Deregulation and greater competition must not come at the price of sacrificing universal service goals. Access to affordable telephone service must remain available to all citizens, urban and rural, rich and poor.

The Commission seeks comment on whether it would be consistent with sections 251(d)(1) and 254 of the Act for states to include any universal service costs or subsidies in the rates they set for interconnection, collocation, and unbundled network elements.[17] The Commission suggests that the Act's requirement that all telecommunications service providers make an "equitable and

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[17]Notice at ¶ 145.

nondiscriminatory contribution to the preservation and advancement of universal service," can be interpreted as requiring competitively-neutral mechanisms for recovering universal service support, rather than recovering such support through rates for interconnection or unbundled network elements.[18]

The Attorneys General agree that the statutory principles for universal service articulated in the Act seem to contemplate competitively-neutral universal service funding mechanisms and we anticipate that the universal service reform proceeding currently underway will provide for such mechanisms.[19] We generally support the principle of competitive neutrality in establishing universal service support mechanisms. We recognize its importance in creating a level playing field for competition and agree that the recovery of universal service support through implicit mechanisms such as interconnection rates may make it more difficult to ensure that universal service contributions are competitively neutral. We believe that the Act intends universal service support payments to be, to the extent possible, explicit, rather than implicit.

In establishing interconnection and unbundling requirements, however, the Commission should be careful not to classify legitimate contributions to joint and common costs in rates for interconnection and unbundled network elements as impermissible implicit universal service support payments.[20] Including contributions to joint and common costs in such rates is not inconsistent with

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[18]See 1996 Act, sec. 101, § 254(b)(4).

[19]*In the Matter of Federal-State Joint board on Universal Service*, CC Docket 96-45.

[20]Without providing a definitive definition of "joint" or "common" costs, we refer to the costs of facilities used to provide multiple services which cannot be attributed exclusively to any one service, including the cost of provisioning the local loop which is used by many services to supply

the principle that universal service support payments be explicit. Indeed, it is wholly consistent with the section 254 requirement that "the services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide these services."[21] The Act clearly contemplates that joint and common costs be recovered through other mechanisms, and not only universal service support mechanisms.[22] Thus, states must be allowed to include contributions to joint and common costs in rates for interconnection and unbundled network elements. The Commission must not limit in any way the states' ability to determine appropriate contributions to joint and common costs in setting rates for interconnection and unbundling.

VI. THE COMMISSION SHOULD ESTABLISH MINIMUM GUIDELINES FOR GOOD FAITH NEGOTIATING.

The 1996 Act unequivocally imposes upon incumbent LECs and competitors a duty to negotiate in good faith.[23] It is imperative that the LECs honor this obligation for competition to develop expeditiously. Incumbent LECs have vastly superior bargaining power over potential new entrants. They control the essential facilities necessary to compete in the local exchange market as well as the information about the costs and capabilities of these facilities.

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interconnection between subscribers.

[21] 1996 Act, sec. 101, § 254(k) (emphasis added).

[22] We note that the Department of Justice recognizes that incremental cost-based rates for interconnection and unbundling may need to be adjusted to permit recovery of forward-looking joint and common costs that may not be included in the sum of element-by-element TSLRIC-based rates. See Department Comments at 27.

[23] 1996 Act, sec. 101, § 251(c)(1).

The Attorneys General encourage the Commission to establish minimum national guidelines regarding good faith negotiation under section 251(c)(1) of the Act that will clearly prohibit practices designed to impede the negotiations process and that will facilitate fair and balanced negotiations. Although it would be impossible to delineate prospectively all variations of bad faith negotiating tactics, the Commission should establish minimum standards for negotiations which identify specific prohibited practices.

At a minimum, the Commission should explicitly prohibit the types of practices mentioned in the Notice.[24] LECs should not be allowed to impose unwarranted preconditions to negotiations such as requiring overly broad confidentiality agreements and liability releases, or any other form of agreement that limits a requesting party's legal remedies in the event of disputes. Such demands clearly contradict commonly accepted principles of good faith negotiating.

In addition, the Commission should prohibit LECs from demanding more information about a requesting party's plans than is necessary to provide a reasonable understanding of the party's request. Parties should not be forced to divulge detailed business plans or to identify potential customers. Being coerced to reveal plans to compete to a competitor prior to entry in the market is hardly conducive to a truly competitive environment.

Finally, the Commission should confirm that the duty to negotiate attaches as soon as a good faith request for interconnection services or network elements has been made under section 252, and not at some later point in time. We understand that some LECs have raised the argument that they are under no obligation to negotiate until the instant rulemaking is completed or until the requesting

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[24]Notice at ¶ 47.

party has received a grant of state certification to provide local telecommunications services. These arguments run contrary to the Act's clear intent to remove barriers to entry immediately. If state laws require negotiations to begin sooner, these mandates should be viewed as pro-competitive and entirely consistent with the Act. LECs should not be allowed to refuse to negotiate until further proceedings, either at the state or federal level, are completed.

The practices mentioned above are only a few examples of the types of negotiating postures and tactics that should be explicitly prohibited under good faith bargaining standards established by the Commission. Our discussion is not intended to provide an exhaustive list of practices that should be prohibited. The Commission may identify additional obstacles to negotiation that should be expressly banned. The Commission, however, should not attempt to provide an exhaustive list in its rules. In general, any good faith bargaining standards established by the Commission should be presented as a baseline for good faith negotiating, (or minimum requirements, as opposed to maximum requirements), so they are not construed as the definitive boundaries for good faith negotiating. States should be allowed to supplement the Commission's standards and there should be sufficient flexibility to address new and varied negotiating obstacles and problems as they arise. In addition, the Commission should propose specific standards that could be used by state authorities to evaluate allegations of bad faith.

VII. THE COMMISSION SHOULD ESTABLISH CONCURRENT STATE AND FEDERAL ENFORCEMENT JURISDICTION.

Congressional intent to provide for shared state and federal responsibility in telecommunications reform under the 1996 Act is apparent throughout the Act. The balance of state

and federal responsibility is particularly critical regarding enforcement of the Act. The Commission seeks comment on enforcement authority to address compliance with sections 251 and 252 of the Act.[25]

The Attorneys General believe that the states have concurrent enforcement authority with the Commission. The Commission should not limit local enforcement authority or the authority of states to deal with complaints alleging violations of sections 251 and 252 of the Act. Concurrent enforcement jurisdiction is consistent with the Act's clear intent to establish shared state and federal regulatory authority. The states should, however, have primary enforcement authority with respect to their own intrastate interconnection and access regulations under 251(d)(3).

Private remedies also may exist under state law. The availability of meaningful private remedies may significantly further the Act's implementation. As is the case with enforcement of antitrust laws, the existence of concurrent state and federal enforcement authority, together with private remedies, should significantly further compliance with the Act.

VIII. CONCLUSION.

The Telecommunications Act of 1996 presents enormous challenges and opportunities for the states and the Commission to carry out the legislative policy of opening telecommunications to fair competition. The establishment of minimum requirements for interconnection and unbundling together with pricing based on a forward-looking, cost-based methodology will further real competition. The Commission should not preclude states from allocating some portion of joint and common costs to rates for access and unbundled network elements to ensure that local subscribers

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[25]Notice at ¶ 41.

do not unreasonably bear the cost of local service that is common to the entire network. We also encourage the Commission to establish minimum standards for good faith negotiating. Finally, the Commission should establish a concurrent state and federal enforcement scheme for addressing complaints about violations of sections 251 and 252 of the Act and the Commission's related rules.

In order to realize the anticipated benefits of expanded consumer choices, greater diversity and reasonable prices, we urge the Commission to take action consistent with these principles.

Dated: May 30, 1996

Respectfully submitted,

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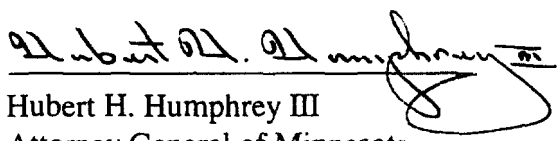

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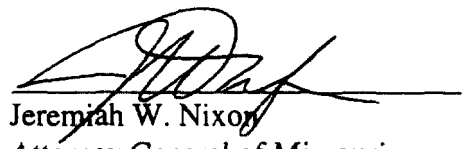

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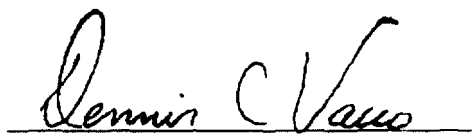

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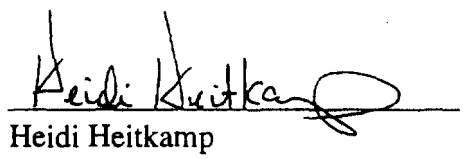

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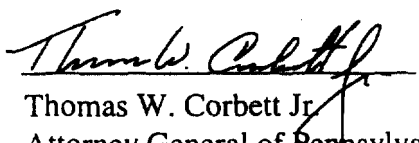

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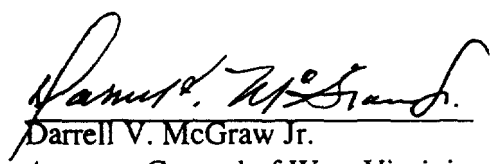

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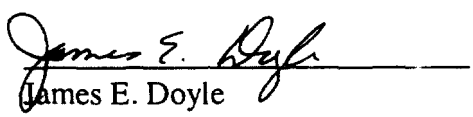

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